Constructing Civil Liberties

Discontinuities in the Development of American Constitutional Law

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CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 2004

Printed in the United States of America

Typeface Sabon 10/12 pt. *System* LaTeX 2ε [TB]

A catalog record for this book is available from the British Library.

Library of Congress Cataloging in Publication Data

Kersch, Kenneth Ira, 1964–
Constructing civil liberties : discontinuities in the development of American constitutional law / Ken I. Kersch.
p. cm.
Includes bibliographical references and index.
ISBN 0-521-81178-3 (hardback) – ISBN 0-521-01055-1 (pbk.)
1. Civil rights – United States – History. 2. Judicial review – United States.
3. Law and politics. I. Title.
KF4749.K47 2004
342.7308′5–dc22 2003060534

ISBN 0 521 81178 3 hardback
ISBN 0 521 01055 1 paperback

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Introduction

This is a book about the paths of constitutional development culminating in the U.S. Supreme Court's landmark civil liberties and civil rights jurisprudence of the 1960s and 1970s. The roads to *Mapp v. Ohio* (1961) (search and seizure/privacy), *University of California Board of Regents v. Bakke* (1978) (affirmative action), *Engle v. Vitale* (1962) (separation of church and state), and other emblematic decisions marking the high tide of twentieth-century constitutional liberalism, I argue here, should be understood not as the issue of a single, linear and unidimensional path marked by the post–New Deal Court's newfound willingness to protect "personal" (as opposed to "economic") rights and liberties, and tracing out the implications for particular fact scenarios of abstract principles such as "privacy," "liberty," or "equality." These doctrinal landmarks are, rather, the diverse endpoints of a layered succession of progressive spirited ideological and political campaigns of statebuilding and reform. In the heat of these campaigns – whose center was typically outside the Court – it was apparent to the participants that key rights and liberties conflicted, and the meaning of both was contested. As such, it was understood by those animated by a strong substantive vision that some key rights and liberties would have to be jettisoned or circumscribed to advance others. Only after these campaigns succeeded, as part of the process of ideological institutionalization, were backwards-looking narratives created – off the Court and on – that worked to legitimate these achievements as rights-protecting triumphs and part of a linear, teleological march of progress.[1]

The narrative of constitutional development concerning rights and liberties that I characterize as backwards-looking pivots around the centerpoint of the New Deal. That narrative has shaped the agenda for constitutional scholars for most of the last century. One of its most significant characteristics

[1] *Mapp v. Ohio*, 367 U.S. 643 (1961); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Engel v. Vitale*, 370 U.S. 421 (1962).

was that the developmental trajectory it imagines – a linear, teleological trajectory of barrier, breakthrough, and apotheosis – was highly court-centered. As such, it launched a raft of court-centered constitutional scholarship whose questions were framed by the pull of the narrative. At the core of this work were questions concerning judicial review, judicial activism, and judicial restraint. Since the reformers who made this constitutional revolution (chiefly Progressives and New Dealers) were at first outsiders to the role of shaping legal doctrine, they began their careers as critics of court power. Once they took hold of the reins of state and began to staff the courts themselves, however, the scholarship shifted, and they began to ask new and multi-layered questions that reflected this developmental sequence. Rather than simply decrying judicial review and judicial activism, their new task was to remain at least rhetorically consistent with the views on which their newfound power had been won, while moving, in turn, to justify both. This involved the formulation of new constitutional theories that set out in nuanced ways why judicial review and judicial activism were justified in some circumstances (for ends that they approved) and not others (for ends that they opposed). This new constitutional thinking began by stipulating a level of statism that was foreign (or fundamentally antagonistic) to the old constitutionalism. And it posited a new imperative involving the protection of civil liberties and civil rights. Structured as it was, the new constitutional scholarship was in its very sinews heavily implicated in the political project of justifying, institutionalizing, and (as conditions worked to decay its foundations) defending the New Deal constitutional regime.

In pivoting around barrier, breakthrough, and apotheosis, the foundational narrative of constitutional development I describe above – what I will call the "traditional narrative" – is a paradigmatic example of "progressive" history. And, indeed, this should hardly be surprising, as it is directly related to the work of the great progressive historians themselves, such as Charles Beard and Vernon Parrington, who served as the advance guard for the reformist program later institutionalized in the New Deal.[2] It is also a paradigmatic example of Whig history. Such histories, as historian Herbert Butterfield has described them, endeavor to cut "a clean path through . . . complexity" through "an over-dramatization of the historical story" that pits the forces of progress against the forces of reaction. The historical task of the former is to remove the "obstructions" that are either thrown up by or defended by the latter. The Whig historian, Butterfield

[2] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913); Vernon Parrington, "Introduction," in J. Allen Smith, *The Growth and Decadence of Constitutional Government* (New York: Henry Holt and Co., 1930). See William J. Novak, "The Legal Origins of the Modern American State," in *Looking Back at Law's Century: Time, Memory, and Change*, eds. Austin Sarat, Robert Kagan, and Bryant Garth (Ithaca, NY: Cornell University Press, 2002), 249–60.

writes, "very quickly busies himself with dividing the world into the friends and enemies of progress."[3]

Far from rendering narratives concerning historical trajectories implausible, the Whig approach is enormously seductive. Indeed, Butterfield concludes "[t]he truth is that there is a tendency for all history to veer over into Whig history" to the point where "it has been easy to believe that Clio herself is on the side of the Whigs." What is so seductive about Whig histories is that they are paeans to the illumination and glory of the present. Whig histories of the New Deal and the gradual achievement of court-protected civil rights and civil liberties have been so successful because, despite the anachronistic (and romantic) understanding of many of their purveyors as perpetual outsiders, in fundamental and gratifying ways they reflect and reinforce the discourse of power in contemporary thinking concerning twentieth-century American constitutional development.[4]

To say that constitutional thinking for most of the last century was written under the intense gravitational pull of the New Deal revolution is not to say that these histories are false in any broad sense or failed to yield important evidence and insights concerning the trajectory of American constitutionalism. After all, there was in fact a New Deal standoff. And it is undeniable that the agenda of the Supreme Court prior to the New Deal was different in important ways from the Court's agenda after it. Nor is it to gainsay that during the heyday of Whiggishness many detailed historical studies were written that effectively steered clear of the snares and perils of Whiggism. But in his anatomy of Whig histories, Butterfield himself noted that "[I]t is true that this tendency is corrected to some extent by the more concentrated labors of historical specialists." Nonetheless, he properly concluded, the tendency to Whig history is "so deep-rooted that even when piece-meal research has corrected the story in detail, we are slow in re-valuing the whole and reorganizing the broad outlines of the theme in light of these discoveries." There remains a persistent "tendency to patch the new research into the old story even when the research in detail has altered the bearings of the old subject."[5]

My contention in this book is that "research in detail" – my own (as presented here) and that of an ever-growing body of others (including Mark Graber, David Rabban, and G. Edward White's on the freedom of speech; Philip Hamburger's and John T. McGreevy's on the separation of church and state; David Bernstein's on the relationship between the state, the labor

[3] Novak, "Legal Origins of the Modern American State," 258 (referring to "the classic progressive trope: law as obstruction"). Herbert Butterfield, *The Whig Interpretation of History* (New York: W. W. Norton, 1965), 5, 29, 34.

[4] Butterfield, *Whig Interpretation*, 6, 8.

[5] Butterfield, *Whig Interpretation*, 5, 6. See also Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *American Political Science Review* 94 (June 2000): 251–67, 260 ("understandings of the political world should themselves be susceptible to path dependence").

movement, and civil rights; Diane Ravitch's on progress in education; Kenneth Murchison's on prohibition; and Michael Klarman, Hugh Davis Graham, and John David Skrentny's on civil rights) has now accumulated to such an extent that it *fundamentally* undermines the plausibility of the third stage of the Whiggish New Deal constitutional narrative, and, in the process, of the entire narrative itself.[6] That third stage, involving the "end" – or the apotheosis – imagines what many today, under the pull of a still prevalent Whiggishness, would continue to call "civil rights and civil liberties," as the essence of the thing itself. Put otherwise, it sees the apotheosis as a "matter of principle."[7]

This book, in the spirit of the works cited above – which, in the nature of things, is a revisionist spirit – aspires, in a context long set by the pull of New Deal constitutional Whiggism, to unsettle our wonted assumptions. It does so by jettisoning the faith that the idiosyncratic and fundamentally contested policy end points that traditional legal scholars and political scientists dub "civil rights and civil liberties" represent in any broad sense an apotheosis of progress over reaction or the triumph of principle as if this were part of an

[6] David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1997); Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1991); G. Edward White, "Free Speech and the Bifurcated Review Project: The 'Preferred Position' Cases," in *Constitutionalism and American Culture: Writing the New Constitutional History*, eds. Sandra VanBurkeo, Kermit L. Hall, and Robert J. Kaczorowski (Lawrence: University Press of Kansas, 2002), 99–122; G. Edward White, "The First Amendment Comes of Age," *Michigan Law Review* 95 (1996): 299–392; Philip Hamburger, *The Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002); John T. McGreevy, *Catholicism and American Freedom: A History* (New York: W. W. Norton, 2003); David E. Bernstein, *Only One Place of Redress: African Americans, Labor Regulations, and the Courts, from Reconstruction to the New Deal* (Durham, NC: Duke University Press, 2001); Diane Ravitch, *Left Back: A Century of Failed School Reforms* (New York: Simon and Schuster, 2000); Kenneth M. Murchison, *Federal Criminal Law Doctrines: The Forgotten Influence of National Prohibition* (Durham, NC: Duke University Press, 1994); Michael Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," *Virginia Law Review* (February 1996): 1–67; Hugh Davis Graham, *Collision Course: The Strange Convergence of Affirmative Action and Immigration Policy in America* (New York: Oxford University Press, 2002); John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (Chicago: University of Chicago Press, 1996); John D. Skrentny, *The Minority Rights Revolution* (Cambridge, MA: The Belknap Press of the Harvard University Press, 2002). See also Eileen L. McDonagh, "The 'Welfare Rights State' and the 'Civil Rights State': Policy Paradox and Statebuilding in the Progressive Era," *Studies in American Political Development* 7 (Fall 1993): 225–74; Ken I. Kersch, "The Reconstruction of Constitutional Privacy Rights and the New American State," *Studies in American Political Development* 16 (Spring 2002): 61–87; Karen Orren and Stephen Skowronek, "What is Political Development?" paper presented at annual meeting of the American Political Science Association, San Francisco, California, August 29 – September 2, 2001.

[7] See Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985). See also Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: The Belknap Press of the Harvard University Press, 1991).

ineluctable trajectory of history. In the absence of and in place of this faith, this book offers a series of empirical interpretive case studies involving three illustrative sites of constitutional order concerning constitutional rights and liberties – criminal process rights concerning privacy, workplace and labor rights, and civil liberties and civil rights in education – each culminating roughly (depending on the nature of the trajectory under study) with the Warren Court (1953–69) apotheosis, which the most influential scholars in the field have taken to be the high water mark of a judicial solicitude for civil rights and civil liberties. By taking a developmental approach that purposely rids itself of the gravitational pull of the Whiggish New Deal narrative (which many developmental histories do not) I offer, as a substitute for the field's wonted moralism and Whiggism, a sustained contemplation of the genealogy of contemporary constitutional morals.[8]

The Disintegration of the Historical Conditions that Produce Whiggish Constitutional Histories

While the traditional Whiggish narrative of contemporary rights and liberties – and the questions it perpetually throws up in legal scholarship – still defines the field, it is not nearly as predominant as it once was. Indeed, it is this decomposition in plausibility that has made possible both this study and other revisionist accounts of contemporary civil rights and civil liberties. Signs of the disintegration of the Whig narrative are apparent even in the work of leading constitutional Whigs such as Bruce Ackerman and Akhil Amar, who, for example, have both been influenced by the cyclical and decidedly non-progressive critical elections realignment theory of political scientists such as Walter Dean Burnham.[9] Although both Ackerman and Amar fashion teleological constitutional narratives that reach their apotheosis in contemporary constitutional liberalism, their pointed rejection of what Ackerman calls "the bicentennial myth" – which holds that the meaning of

[8] See Wendy Brown, *Politics Out of History* (Princeton: Princeton University Press, 2001), 91–120. See also Richard A. Posner, *Problematics of Moral and Legal Theory* (Cambridge, MA: The Belknap Press of the Harvard University Press, 1999). For the developmental accounts that laid the groundwork for this study by analyzing periodized trajectories of constitutional development, but (as I see it) in their structure remain vestigially wedded to the Whiggish (and moralizing) New Deal narratives, see Ackerman, *We the People*; Howard Gillman, "Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence," *Political Research Quarterly* 47 (September 1994): 623–53; Howard Gillman, "Political Development and the Rise of the 'Preferred Freedoms' Rubric in Constitutional Law," paper presented at the University of Maryland Constitutionalism Discussion Group, College Park (April 2002).

[9] Bruce Ackerman, *We the People: Foundations*; Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998); Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (New York: W. W. Norton, 1970).

the constitution is ineluctably tied to its meaning at one fixed time, located in a remote eighteenth-century past – plainly invites consideration of regimes and change into grand narratives of American constitutional history. Work in other areas, although not necessarily reflecting an express anti-Whiggism, clearly evinces a new attraction to questions that either challenge the traditional narrative and the conclusions scholars have drawn from its assumptions or, alternatively, originate wholly outside it. For instance, much of the new constitutional scholarship emphasizes the relative *unimportance* of judicial review as a political (and, hence, intellectual) problem, choosing to focus instead, even in explicitly constitutional studies, on either politics or the Constitution outside the courts. And even the work that does accord significant constitutional importance to courts increasingly treats those institutions as influenced by external political or ideological forces or heavily implicated in a regime-sustaining ideological endeavor. While puzzles of New Deal vintage, of course, continue to preoccupy many law professors and political theorists, this persistence is chiefly a matter of the institutional structure and politics of contemporary intellectual life (large ships turn slowly). In its most dynamic elements, the turn in the field is decidedly post–judicial review.[10]

These new preoccupations are not so much aberrations as a return, following a sustained and highly atypical period of elite consensus over

[10] See Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty: Part Five," *Yale Law Journal* 112 (November 2002): 153–259. See, e.g., Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 279–95 (Supreme Court as part of broader governing coalition); Mark A. Graber, "The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 35–73 (key landmark instances of judicial review represent the delegation by legislatures to courts of disruptive political issues); George Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (New York: Cambridge University Press, 2003)(judicial review as part of the legislative agenda); Barry Friedman, "Dialogue and Judicial Review," *Michigan Law Review* 91 (1993): 577; Michael J. Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," *Virginia Law Review* 82 (1996): 1–67 (arguing against the importance of countermajoritian judicial review in the development of twentieth-century civil rights and civil liberties); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991)(judicial review plays significantly lesser role than commonly thought in generating social change); John B. Gates, *The Supreme Court and Partisan Realignment: A Macro- and Micro-Level Perspective* (Boulder, CO: Westview Press, 1991); Keith E. Whittington, "Constitutional Theories and the Faces of Power," in *Alexander Bickel and Contemporary Constitutional Theory*, ed. Kenneth Ward (Albany: State University of New York Press, forthcoming); Keith E. Whittington, "To Support This Constitution: Judicial Supremacy in the Twentieth Century," in *Marbury v. Madison: Documents and Commentary*, eds. Mark A. Graber and Michael Perhac (Washington, DC: Congressional Quarterly Press, 2003); Keith Whittington, *Constitutional Construction* (Cambridge, MA: Harvard University Press, 1999)(significant features of our governing constitutionalism constructed outside the courts); *Judicial Independence in the Age of Democracy: Critical Perspectives*, eds. Peter H. Russell and David M. O'Brien (Charlottesville: University of Virginia Press, 2001), 7–8 (willingness of courts to void legislation no indication of judicial independence).

fundamental (and fundamentally political) constitutional commitments, to the contemplation of a normal state of affairs in American constitutional politics. Indeed, looked at retrospectively, the work of Rawls, Dworkin, and Ackerman seems to have been written at the high-water mark of contemporary constitutional liberalism, just before its tide began to recede. The realignment toward conservative national politics that began with Ronald Reagan's election to the presidency in 1980 ushered in a sustained challenge to key commitments of the New Deal regime (and its later outgrowths, such as the Great Society), including its basic assumptions concerning principles of structure and rights.[11] This political turn changed the composition of the federal judiciary (including the Supreme Court), and both altered and reflected shifting public attitudes toward centralization, statism, and long since reified contemporary definitions of civil liberties and civil rights.[12] Despite the institutional encrustation of statist liberalism within university faculties that tracked the imperatives and commitments of the prevailing regime, new paths of intellectual inquiry, both off campus and on, gradually opened up.

See also Stephen Skowronek, *Building a New American State* (courts as instruments of state and regimes, often serving distinctive institutional and ideological functions); Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916* (New York: Cambridge University Press, 1988), 86–175; Ken I. Kersch, "The Reconstruction of Constitutional Privacy Rights" (courts as permeated by progressive thought concerning statebuilding and working to negotiate transitions from an old to a New American State). On the way in which elites have used judges to instituitonalize policy gains that they perceive as under siege, see Ran Hirschl, "The Struggle for Hegemony: Understanding Judicial Empowerment through Constitutionalization in Culturally Divided Polities," *Stanford Journal of International Law* 36 (2000): 73–118; Ran Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions," *Law and Social Inquiry* 25 (Winter 2000): 91–149; Ran Hirschl, *Toward Juristocracy: A Comparative Inquiry into the Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891," *American Political Science Review* 96 (2002): 511–24. See also Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982) (focusing on judicial review, but radically removing it from foundationalist questions of constitutional philosophy and treating its study as a study of legalist justificatory and legitimating rhetorics or "argumentative modes"). Landmark works from the time when the problem of judicial review was at the center of the analysis include Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

[11] See Ronald Kahn, *The Supreme Court and Constitutional Theory: 1953–1993* (Lawrence: University Press of Kansas, 1994). See Deborah A. Morris, "The Transmogrification of *United States v. Carolene Products*," paper presented at the annual meeting of the Western Political Science Association, Las Vegas, NV (March 2001) (noting that "Footnote Four lived in relative obscurity until the 1970s").

[12] See Thomas Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004).

The current Supreme Court commonly splits 5–4 on the most contentious issues of structure and rights. In an atmosphere in which both sides hurl charges of judicial activism on some issues and call just as vehemently for restraint on others, where charges of hypocrisy are endemic, and whereon some issues (most prominently, free speech) it is becoming increasingly difficult to label particular arguments and holdings as self-evidently "liberal" or "conservative," the intellectual and political influence of consensus theories positing a triumph of principle has sharply diminished.

Put otherwise, the study of American constitutionalism has once again assumed its place, not as a branch of consensus moral philosophy, but within the larger, messier, and decidedly less pristine study of American politics. To the extent that political practice implicates important creedal principles – and I believe it does – it also entails both contestation over the meaning of those principles and the perpetual imperative of making tragic choices between those principles – such as liberty and equality or privacy and publicity – when, as is commonly the case, one conflicts with another. The meanings are defined and choices made in concrete political circumstances and institutional contexts, with the decision in each case shot through with pull of specific, historically situated goals, aversions, hopes, and fears. As a distinctively political study (as opposed to a philosophical one), politics is constituted by contestation and by choice between incommensurables. As such, it is not linear.[13]

American constitutionalism is, however, developmental. To the extent that it represents the enshrinement of a choice or principle in either constitutional doctrine or another political institution, the subsequent meaning of that institutional achievement is not determined by the *intent* animating the initial achievement. Rather, that achievement lives in an "interinstitutional" environment characterized by patterns of intercurrence, where "different institutional rules and norms will abut and grate as a normal state of affairs." This is as true for civil rights and civil liberties as it is for any other aspect of law within political life. To the extent that it is a narrative positing a linear progression toward an equilibrium (such as "the protection of civil rights and civil liberties"), that narrative is not developmental in the sense in which we understand the processes of political development today. In this book, I provide a series of case studies canvassing the multifarious ways in which constitutional development concerning civil rights and civil liberties reflects the patterns of development and change identified in recent, groundbreaking work by scholars of political development.[14]

[13] See Samuel Huntington, *American Politics: The Promise of Disharmony* (Cambridge, MA: The Belknap Press of the Harvard University Press, 1981), 12–30; Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford University Press, 1969), 164; Judith N. Shklar, "A Liberalism of Fear," in Judith N. Shklar, *Political Thought and Political Thinkers* (Chicago: University of Chicago Press, 1998).

[14] Karen Orren and Stephen Skowronek, "Institutions and Intercurrence: Theory Building in the Fullness of Time," in *Nomos 38: Political Order*, eds. Ian Shapiro and Russell Hardin (New

Traditional, linear, Whiggish narratives of constitutional development concerning civil rights and civil liberties make critical errors that successful developmental narratives attentive to processes such as intercurrence, path dependency, and unintended consequences would not. A Whiggish narrative may posit a normatively desirable constitutional policy choice as reflecting a sweeping and cross-institutional foundational commitment to a core political principle. So, for example, as I show in the substantive chapters that follow, a Whiggish narrative may imagine the forces of progress to be broadly committed to a "right to privacy" and to the value of privacy itself. But in doing so, it would need to focus almost exclusively on the end point – contemporary understandings of that right – and the issues of sexual and reproductive autonomy surrounding it. In the process, it would need to excise

York: New York University Press, 1996), 111–46); Ira Katznelson, "Structure and Configuration in Comparative Politics," in *Comparative Politics: Rationality, Culture, and Structure*, eds. Mark Irving Lichbach and Alan S. Zuckerman (Cambridge: Cambridge University Press, 1997), 81–111; Paul Pierson, "Not Just What, but *When*: Timing and Sequence in Political Processes," *Studies in American Political Development* 14 (Spring 2000): 72–92; Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *American Political Science Review* 94 (June 2000): 251–67; Paul Pierson and Theda Skocpol, "Historical Institutionalism in Contemporary Political Science," in *Political Science: The State of the Discipline*, eds. Ira Katznelson and Helen V. Milner (New York: W. W. Norton, 2002), 692–721, 708 ("Functional interpretations of politics are . . . suspect because of the sizable temporal gap between actors' actions and the long-term consequences of those actions. Political actors, facing the pressures of the immediate or skeptical about their capacity to engineer long-term effects, may pay limited attention to the long run." It is the case, however, that "the long-term effects of institutional choices . . . are frequently the most profound and interesting ones." They are only understood by seeing them "as the *by-products* of social processes rather than embodying the goals of social actors."); Arthur Denzau and Douglass C. North, "Shared Mental Models: Ideologies and Institutions," *Kyclos* 47 (1): 3–31. For complementary approaches taken by legal scholars, see J. M. Balkin, "Ideological Drift and the Struggle Over Meaning," *Connecticut Law Review* 25 (1992–1993): 869–91; Richard H. Fallon Jr., *Implementing the Constitution* (Cambridge, MA: Harvard University Press, 2001), 7 ("by rejecting the mesmerizing notion that the Court's only proper role is identifying the Constitution's one, true meaning, we can get a richer picture of what the Court does and a more enlightening framework for considering what the Court ought to do. . . . [A]bandoning the view of doctrine as ideally being a perfect reflection of constitutional meaning helps us better appreciate the array of choices open to the Court in crafting [constitutional] rules and tests. We can begin to see different kinds of tests that the Court familiarly uses as available, but seldom necessary, mechanisms for protecting constitutional values." Moreover, Fallon argues, it is a mistake to assume "every case should furnish an occasion for judicial inquiry into the truth about what the Constitution means. The Supreme Court patently does not function in this way. In most cases, the Court proceeds on the tacit understanding that it will apply, without reexamining, frameworks that were crafted in earlier decisions" [43–4]. "In extraordinary cases, the Court concludes that it cannot resolve the question before it without either crafting new doctrine or reconsidering the wisdom or applicability of an existing doctrinal framework" [43]. Even in extraordinary cases, "the Court must go beyond the abstract moral principles rightly celebrated by the forum-of-principle model; the Justices must draw on psychology, sociology, and economics to craft doctrines that will work in practice, without excessive costs, and that will prove democratically acceptable" [77].

from constitutional history the elaborate campaign *against privacy* and *for publicity* by the progenitors of the contemporary right to privacy who built the New American State, which serves as the foundation for the new constitutionalism to which it is currently committed. A Whiggish narrative will commonly define the contemporary legal landscape, to the extent that it is defined by what we today understand to be "civil libertarian" commitments, as uniquely the product of the pursuit of either founding or noble constitutional principles. But, as I demonstrate below in exploring the emergence of the contemporary civil libertarian doctrine concerning the separation of church and state, an archeological exploration of the genesis of that doctrine may demonstrate that its roots are actually in a unique convergence of half-understood and half-remembered (and, at times, highly ignoble) passions and prejudices, hopes and fears among progressive elites. In a similar dynamic, I demonstrate the way in which many contemporary "civil libertarian" criminal process protections have their roots not in reformist campaigns but in the resistance to the progressive-spirited campaign for prohibition. A Whiggish narrative will tend to view its great reformist breakthroughs as moments that largely clear the field, in the process sweeping away obstacles to a new and more enlightened order. While these breakthroughs often have precisely those effects along the policy dimension targeted by reformers, however, they are just as likely to set up new institutions that constitute new obstacles to the next reformist campaign – as I show in my discussion of the way in which progressive and New Deal labor constitutionalism represented a direct assault on American blacks and, as such, a new barrier to the cause of civil rights. To the extent they are undergirded by claims on behalf of democracy (and, in American constitutionalism, they typically are), Whiggish narratives skew the causal analysis of constitutional change toward society-centered, and away from state-centered, explanations, even though, in certain cases, the latter explanations are clearly predominant. For example, as I show in my discussion of the genealogy of contemporary concern for racial group rights, claims of that sort were alien to American blacks prior to the constitutional innovation according such rights to organized labor. Black Americans adopted self-understandings and a politics of group rights only after they became trapped in a constitutional order structured in significant part by the reformist campaigns of organized labor that constitutionally privileged such claims. Whiggish narratives of constitutional development typically position themselves as liberatory, evolutionary, and "living," in contradistinction to more constricting "conservative" constitutional understandings anchored in interpretive originalism or conceptual formalism.[15] But, as the history of affirmative action and my discussion of the process

[15] See Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of a 'Living Constituiton' in the Course of American Statebuilding," *Studies in American Political Development* 11 (Fall 1997): 191–247.

of institutionalizing group rights in the Supreme Court's labor picketing decisions shows, these narratives are just as likely to hew to regime-defining formalisms in the face of altered demographics and a shifting institutional environment, as are ostensibly conservative constitutional visions.

To be sure, Whiggish narratives of constitutional development do not evince all of these failings. Despite my criticism of Whiggish narratives for their formalism, for example, it would be inaccurate to characterize Whiggish narratives as thoroughly formalistic and their affinities for a "living constitutionalism" a myth. It is not my objective to substitute one linear model for another. My point is, first, that Whiggish narratives import a particular set of unifying myths into the study of constitutional development concerning civil rights and civil liberties. It is, second, that, as presented in the fullness of time, development is as rife with abrasions, abutments, agonisms, drift, and tensions as any other area of political life. As with any ideological system of meaning aimed at justifying a concrete and perpetually altering political order, it is the job of constitutional Whiggism to reconcile essentially irreconcilable commitments in an emotionally satisfying and, hence, politically plausible way.[16] As students of political development, with the aim of understanding the nature of change, it is our job to pull them apart.

Toward an Affirmative Theory of Constitutional Development in the New American State

Although I have spent some time here setting out the failings of traditional narratives of constitutional development concerning civil rights and civil liberties, and although I frame this book's substantive chapters in opposition to those narratives, my main purpose in the pages that follow is not negative but positive. In those chapters, I do not so much reject the Whig narrative of constitutional development as invite it in as an endogenous part of an affirmative, historically anchored theory of *constitutional* development that takes seriously the ideological process involving the construction of constitutional legitimacy.[17]

[16] See Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1986), 1–28; Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 8, 11, 17–20.

[17] I consider *constitutional* development to be a distinctive part of the broader project of *political* development, with the former preoccupied with the task, under altering conditions and imperatives, with the perpetual construction and reconstruction of legitimate authority. As such, the study of constitutional development may be an empirical study, but it is also inevitably a study of ideas. Some, while sharing an interest in these dynamics concerning legitimacy, do not draw a sharp distinction between constitutional and political development. Orren and Skowronek, for example, argue that political development generally is about the construction of authority. Much of the ideological work in this area is

My central thesis here is that constitutional development in what I call the "New Constitutional Nation," a nation constructed beginning in the late nineteenth and early twentieth centuries and continuing to the present, has proceeded simultaneously on two tracks. One involved the building of the physical institutions and coercive apparatus of the modern "New American State."[18] And the second involved the ongoing ideological work of constructing that perpetually altering and expanding state – including, in its inception, the trimming and even jettisoning of commitments to long-standing creedal constitutional liberties and rights – as a legitimate source of national governing authority. Until quite recently, scholars of American

accomplished through constitutional discourse, which they implicitly fold into the category of political development. Wayne Moore, on the other hand, conceives of the construction of authority as, in its broadest sense, a *constitutional* problem, as I do here. See Stephen Skowronek, "Order and Change," *Polity* 28 (Fall 1995): 91–101; Karen Orren and Stephen Skowronek, *The Search for American Political Development*? (New York: Cambridge University Press, 2004); Wayne D. Moore, "Toward a Theory of Partial Constitutional Authority," paper presented at the annual meeting of the American Political Science Association, San Francisco, California (August 2001); Wayne D. Moore, "(Re)construction of Constitutional Authority and Meaning: The Fourteenth Amendment and the Slaughter-House Cases," in *The U.S. Supreme Court and American Political Development*, eds. Ronald Kahn and Ken I. Kersch. See also Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, NC: Duke University Press, 1999); Pamela Brandwein, "The Civil Rights Cases and the Lost Doctrine of State Neglect," in Kahn and Kersch, *Supreme Court and American Political Development*; Kahn, *Supreme Court and Constitutional Theory*; Keith E. Whittington, "The Political Foundations of Judicial Supremacy," in *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change*, eds. Sotirios Barber and Robert P. George (Princeton: Princeton University Press, 2001) (on the construction of the authority of the Supreme Court as an instituiton). Sociologist James Nolan sets out a useful, interactive, dialectical model of the construction of state authority by culture-state interaction that is compatible with my own. For Nolan, "legitimacy . . . refers to the cultural ideas and value systems that undergird the practical functions of the state . . . [or] the sources of legitimacy that give moral and philosophical justification (or 'normative dignity') to the laws, policies, and programs of a given state system." Nolan singles out court decisions in particular as exercises of state power in which "justifications for the existence of a given law" are commonly set out. He adds that "[a]n important and too often overlooked component of theories of state legitimation is a focus on the significant influence of the changing cultural codes of moral understanding that justify the laws, functions, and policies of the state. Recognizing that the state and culture exist in a dialectical relationship with each other . . . [leads us] to consider the cultural codes that [undergird] and [give] meaning to the state." Nolan, *Therapeutic State*, 26, 45; Bobbitt, *Constitutional Fate*, 243–4. I note that Bobbitt, while not denying that law is influenced by political, social, economic, and intellectual trends, makes a fairly sharp distinction between legitimating legal/constitutional arguments from these other spheres, which may influence constitutional law. I agree that the distinction is a useful one. But, as is evident in Bobbitt's work itself, it is far from hermetic. And my chief interest, unlike Bobbitt's, is precisely at the line between the two, which marks the fulcrum of constitutional legitimacy. See, generally, Shklar, *Legalism*; Shapiro, *Courts*.

[18] Or what Lowi calls "constitutive" public policy. Theodore J. Lowi, "Four Systems of Policy, Politics, and Choice," *Public Administration Review* 33 (July/August 1972): 298–310. Skowronek, *Building a New American State* (Cambridge: Cambridge University Press, 1982).

political development have devoted most of their time to the first part of this project. Scholars of *constitutional* development, however, as scholars of *constitutionalism*, are properly charged with devoting sustained attention to its second track. As empirical scholars concerned with the construction of legitimacy across time, it behooves them to avoid taking their cues from legalist intellectuals and legalist political theorists in formulating their models and categories and, as I do here, to treat them as endogenous and invested participants in this ongoing and ideologically charged process of constitutional construction.[19]

A Note on Periodization

I offer the previously outlined two-track model of constitutional development as a model uniquely appropriate to understanding American constitutionalism in the twentieth century. The case studies in constitutional development concerning civil rights and civil liberties presented here draw a distinction between an initial constitutional order – the constitutional adjunct of what Skowronek has characterized as the "state of courts and parties" (the "traditional constitutional order") – and a succeeding New Constitutional Nation, which took flight along with the rise of the New American State. This two-stage periodization is far from chronologically pristine: The transition from one stage to the other does not pivot on a "constitutional moment" or single transformative event. And, the legitimation-focused, regime-sustaining accounts of others notwithstanding, it does not align neatly with any critical election that serves to ratify its authority as a whole.[20] Internally, neither order is characterized by strict, unchanging

[19] See Whittington, *Constitutional Construction*. I share with Whittington a belief that the Constitution "must be constructed from the political melding of the document with external interests and principles." Whittington's interest is in constructions of the Constitution by the executive and legislative branches of government and in "altered constitutional practices [that] barely affected judicial doctrine." While I agree strongly that the constructions Whittington identifies are highly significant, I argue here for the additional importance of constructions arising in social, political, and intellectual life, as well as within formal governing institutions, and I am very much interested in the way that these ultimately affect judicial doctrine.

[20] See Wayne D. Moore, "Reflections of Constitutional Politics in the Early Judicialization of Reconstruction," paper presented at the annual meeting of the American Political Science Association, Boston, Massachusetts (29 August 2002). Wayne D. Moore, "(Re)construction of Constitutional Authority and Meaning," in Kahn and Kersch, *Supreme Court and American Political Development*. Here, I join the trend in studies of American constitutional development to decenter the narrative away from the New Deal. See Skowronek, *Building a New American State*; Whittington, *Constitutional Construction*; Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998); G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000); Graber, *Transforming Free Speech*; Lovell, *Legislative Deferrals*. See, generally, David R. Mayhew, *Electoral Realignments: A Critique of an American Genre* (New Haven: Yale University Press, 2002).

unities or settlements that necessarily cut across policy areas and institutions, though the first is decidedly more unified and less protean than its successor. Indeed, my chief interest is in the disharmonies and discontinuities and the protean character of civil rights and civil liberties in the New Constitutional Nation, as played against a persistent emotional, and hence political, imperative to reconstruct them as harmonious, continuous, and stable. Because, although roughly distinguishing the old order from the new, I do not posit any single, cross-cutting moment of transition, and because relatively rapid, disharmonious, and discontinuous transitions are a characteristic feature of the new order itself, I have decided to present my three case studies of substantive developmental trajectories in three rather long chapters unencumbered by the chapter breaks that would inevitably import a sharper periodization within these trajectories than that to which I would substantively wish to commit. To render these chapters more readable, however, I have broken them up into segments with numerous sections and subsections.

Following an introduction, as a baseline and a point of contrast, each chapter opens with a discussion of the substantive matter at hand under the traditional constitutional order. These beginnings emphasize, if not rigidity, immutability, and the strictest fidelity, then at least *relative* stability, or *relative* continuity within the processes of change. I take constitutional politics in this traditional order to have been distinctive, not only in its dynamics, but also in its substance. That politics, as Rogan Kersh has shown, was distinctively structured around an articulated set of tensions and competing, and commonly agonistic, principles and institutional commitments. The polarities of these traditional arrangements – Hamiltonianism versus Jeffersonianism, Jacksonianism versus Whiggism, and others – were lived chiefly in the realm of party politics and only rarely in the constitutional decisions of courts. These constitutive agonisms and antagonisms "had negative consequences aplenty, but [they] also permitted separate elements to be more or less peaceably combined, and addressed in American political debate: Hamiltonian nationalism and Jeffersonian localism; Jacksonian southerners' states rights views and Whigs' internal improvements carried out by the central government; individual rights and communal obligation; local civil society efforts and government assistance; and so forth," each of these tensions and themes was treated "in the context of sustained union," which lend a unity to a constitutional order constituted by its commitment to agonism. Under this order, "Americans could balance – if often precariously – political views otherwise perpetually in tension."[21]

Linear, unidimensional narratives of constitutional progress were alien to this order. Such directional unities, in the American context, at least, were not constitutional in the traditional sense; rather, they were religious. These

[21] Rogan Kersh, *Dreams of a More Perfect Union* (Ithaca, NY: Cornell University Press, 2001), 275. See, generally, Skowronek, *Building a New American State*.

unities, which would transform constitutional narratives into moral dramas, were first imported into the marrow of American constitutionalism by a religious reform movement: abolitionism. As abolitionism gained political saliency, it first called into question, and ended by shattering, the bona fides of a structurally balanced, Newtonian constitutionalism that preceded it, a constitutionalism that was understood as a way of managing conflict between different groups and within the government itself.[22] Abolitionism began as an irritant to the national government. But, with the Civil War and the Union's victory, it ultimately ended up laying the groundwork for the transformation of that government into a modern central state. In the process, its constitutional vision was imported into the sinews of the emerging state itself.[23]

Both the moral pull of the abolitionist vision (to the extent it was based on a broad understanding of human equality) and the claims of the Civil War central state, of course, were undermined on a variety of fronts by political and economic developments in the war's aftermath. Over time, especially with the end of Reconstruction, they faded significantly. But, for reasons that have been chronicled (and debated) by political development scholars, the process of statebuilding and nationbuilding, itself in important respects the product of successor reformist movements and campaigns (such as populism, Progressivism, and the labor movement, as well as feminism, and the temperance and social gospel movements), began anew in the late nineteenth and early twentieth centuries. Like abolitionism, these movements were, if not always religious, at least religious in their fervor and singleness of purpose. These movements, like abolitionism, had a singular sense of moral purpose and a belief that any and all means, including national power, could legitimately be used to achieve their goals. The movements imported this moralized constitutional vision into the void created by the disintegration of the traditional constitutional order.

As these developments played themselves out – haltingly and audaciously, partially and uniformly, loudly and *sub silentio* – constitutional arguments appealing to agonistic principles and institutional tensions and balances, were newly at a discount. In contrast, constitutional arguments endeavoring to reconcile conflicts in service of national goals and national movements toward progress, to rework apparently disparate and antagonistic parts and principles into a coherent monistic vision, were now at a premium. In the New Constitutional Nation, *reconciliation* became the order of the day. This

[22] See Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor Books, 1999), nos. 10, 48, 51, 54.

[23] Richard Franklin Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859–1877* (Cambridge: Cambridge University Press, 1990); Richard Franklin Bensel, *The Political Economy of American Industrialization, 1877–1900* (Cambridge: Cambridge University Press, 2000).

defining task and legitimating imperative of statebuilders ultimately led to the invention of modern field constitutional theory. In laboring over this project, public political theorists, such as Herbert Croly – the founder of modern constitutional theory – and, later, law school jurisprudes, played an indispensable role in aligning the mainstream of American constitutional thought with the ideological requirements and governing facts of the New American State. They invented, and continue to invent, the New Constitutional Nation. Croly's foundational contribution was to fashion an emotionally and politically plausible ideological defense of a level of statism in American politics that previously would have been understood, emotionally and politically, as wholly incompatible with a creedal and foundational antistatist Jeffersonian conception to freedom. By taking Croly's new statism as fundamental, later constitutional theorists laid the ideological foundations in monistic, reconciling terms for the political goals of one reformist enthusiasm after another, in a succession that has persisted to the end of the twentieth century. Because causes and imperatives shifted rapidly under this protean new order, *ingeniousness* – or an ever-proliferating (and often frantically rushing) cascade of efforts to legitimate by reconciling incommensurables – became the hallmark of modern constitutional theory. The task became one of a perpetual search, under constantly altering conditions, for the theory that would "work." Some, like Bruce Ackerman, had the grand, synthetic ambitions of the James Madison of contemporary constitutional theory himself, Herbert Croly. But even those with less comprehensive visions took Croly implicitly as their guide.

To a significant extent, the story of modern American constitutionalism is one of the choices reformers aligned with the cause of "progress" made – between statism and antistatism, rights and liberties, one right and another, and one liberty and another – all the while working frenetically and ingeniously to reconcile those choices in an emotionally and politically plausible way as having involved no choice at all, but rather as simply another step in the onward march of progress. Needless to say, a constitutionalism of this sort is especially susceptible to Whiggish understandings of its own history. It is hardly surprising that Whig histories, culminating always in the present on the verge of being born, became the definitive "constitutive stories" of the New Constitutional Nation.[24]

[24] Rogers M. Smith has argued that "civic myths" or "constitutive stories" are essential for mobilizing public support for political regimes and, indeed, to the project of imagining and building nations. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997), 6 (arguing that, to mobilize public support, political leaders have to craft civic myths); Rogers M. Smith, "Citizenship and the Politics of People-Building," *Citizenship Studies* 5 (2001): 73–95. See also Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983); Paul Gerwitz, "Narrative and Rhetoric in the Law," in *Law's Stories: Narrative and Rhetoric in the Law*, eds. Peter Brooks and Paul Gerwitz (New Haven: Yale University Press, 1996). Readers